

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

BRADLY CUNNINGHAM,

Plaintiff,

v.

MELISSA DAVIDSON, an individual;
MICHELLE DODSON, an individual;
DENISE FJORDBECK, an individual; and
JANE OR JOHN DOES 1-20; all in their
individual capacities

Defendants.

Case No. 6:17-cv-109-SI

ORDER

Michael H. Simon, District Judge.

Plaintiff Bradly Cunningham is a prisoner presently incarcerated at the Oregon State Penitentiary. On January 23, 2017, Plaintiff filed a pro se complaint against the named defendants, bringing claims under 28 U.S.C. §1983, alleging theft of his property. ECF 2. On August 7, 2017, Defendants filed an answer to the complaint. ECF 17. On August 16, 2017, Plaintiff filed a motion requesting entry of default against Defendants and a judgment for money damages. ECF 19. On August 18, 2017, Defendants filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). ECF 20. Also on August 18, 2017, Defendants filed a motion to stay discovery pending resolution of their motion to dismiss. ECF 22.

Entry of default and default judgment is proper only when a party against whom judgment is sought has failed to plead or defend their case. Fed. R. Civ. P. 55. Because Defendants timely answered Plaintiff's complaint, entry of default is not proper. A motion to dismiss for failure to state a claim must "be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). The Federal Rules of Civil Procedure include answers to complaints in the definition of a pleading. Fed. R. Civ. P. 7(a). Because Defendants filed their answer before filing their motion to dismiss, they waived their opportunity to file a motion to dismiss. *See Aetna Life Ins. Co. v. Alla Med. Services, Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988) (holding that a motion under Rule 12(b) must be made before pleading if a pleading is permitted).

Plaintiff's Motion for Judgment and Order (ECF 19) is DENIED. Defendants' Motion to Dismiss (ECF 20) is DENIED. Defendants' Motion to Stay (ECF 22) is DENIED AS MOOT.

IT IS SO ORDERED.

DATED this 1st day of September, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge